



Singapore Tax Cases 2023 (Part 2) *Key Tax Cases and Implications for Taxpayers*

26 February 2024, Monday

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KEY TAKEAWAYS

- Expenses incurred by a Section 10E company in respect of an investment that does not produce any income in the relevant basis period for the assessment of tax are not deductible.
- An investment-by-investment approach should be adopted in determining if the investments of a Section 10E company produced income in a particular year.
- A trust deed would be a sham if it was never intended by the settlors to create an arrangement for them to divest themselves of the aspects of beneficial ownership in the manner that is provided for in the trust, while intending to give that false impression to third parties or to the court.

In [Singapore Tax Cases 2023 \(Part 1\)](#), published in the May issue of this journal, two notable income tax cases¹ based on a seminar organised by the [Singapore Chartered Tax Professionals](#) (SCTP) were dissected. The seminar was facilitated by Accredited Tax Advisor (Income Tax) & Accredited Tax Practitioner (GST) Allen Tan, Principal; Jeremiah Soh, Local Principal; and Shawn Joo, Senior Associate, from Baker & McKenzie.Wong & Leow. But these were by no means the only cases of significance in 2023 and we have, separate articles² discussed the impact of key GST cases on the Singapore tax landscape.

This article continues the focus on more seminal tax cases in 2023 which were discussed at the SCTP seminar, specifically, the Income Tax Board of Review (“the Board”) case on the scope of permissible expense deductions for a Section 10E investment company, and the High Court case on the legality of a tax-optimising trust structure.

Should investments continue to be regarded as “income producing” even if it does not produce income for the relevant basis period if they had previously produced income? When is a Trust Deed considered a sham? Let’s find out.

¹ GFG and another v Comptroller of Income Tax [2023] SGTIBR 1 and Singapore Cement Manufacturing Company (Private) Limited v Comptroller of Income Tax [2023] SGHC 57

² See [“Landmark Herbalife Case Dissected”](#) on Herbalife International Singapore Pte Ltd v Comptroller of GST [2023] SGHC 54, and [“GST Missing Trader Fraud”](#) on GHY v Comptroller of GST [2023] SGGST 1.

Scope of Permissible Expense Deductions for a Section 10E Investment Company - GHZ V Comptroller of Income Tax [2023] SGITBR 2

THE FACTS

As the trustee of a Singapore Exchange-listed real estate investment trust, the taxpayer was in the business of the making of investments into retail malls under Section 10E(1), now Section 10D(1), of the Income Tax Act (“ITA”).

In 2005, the taxpayer acquired two operating malls, ABB and ABC. At the point of acquisition, both malls were acquired with existing tenancies and were income-producing investments. They were subsequently closed for reconstruction and redevelopment.

The taxpayer claimed deduction in respect of property expenses and interest expenses (“the expenses”) incurred during the malls’ respective closure period. The Comptroller of Income Tax (“the Comptroller”) apportioned the expenses and disallowed the portion which corresponded to the specific part of the basis period when the respective malls were closed and not producing income.

THE INCOME TAX BOARD OF REVIEW’S DECISION

In this appeal, the key issue was whether expenses incurred during the period of closure of the two malls, when they did not generate income should be deductible under section 14(1). This called to question whether the two malls were regarded as investments which “produce(d) any income” under section 10E(1).

The scope of Section 10E(1)(a)

Applying the principles of statutory interpretation, the Board was of the view that under Section 10E(1)(a), expenses incurred by a Section 10E company in respect of an investment that does not produce any income in the relevant basis period for the assessment of tax are not deductible for the purposes of determining the income of a Section 10E company.

The Board rejected the taxpayer’s interpretation that investments should continue to be regarded as “income producing” even if they do not produce income for the relevant basis period if they had previously produced income at any point in time.

Instead, the Board found that the more logical and natural interpretation of Section 10E(1)(a) is that it provides a further and specific restriction on the deductibility of expenses for a Section 10E company over and above the general deductibility rules in Section 14(1), by disallowing the deduction of expenses incurred during the basis period in which its investments do not produce any income in the same basis period. This is regardless whether any income had been produced by that investment in previous basis periods.

Whether an investment-by-investment analysis should be adopted for Section 10E(1)(b)

The Board agreed with the Comptroller that an investment-by-investment approach should be adopted in determining if the investments of a Section 10E company produced income in a particular year.

The Board was of the view that Section 10E(1)(b) should be interpreted to require that the expenses incurred can only be deducted against income produced by the specific investment for which the expenses were incurred in a particular basis period. Consequently, should the income of the specific investment be zero in that period, expenses incurred for that investment cannot be deducted.

Whether the reconstructed malls amounted to separate and distinct new investments

The Board assessed that the reconstructed malls amounted to separate and distinct new investments. In arriving at this conclusion, the Board considered the corporate intention of the taxpayer and several other factors (for example, that the newly reconstructed malls had completely different features and characteristics physically, structurally, and conceptually).

FOOD FOR THOUGHT

Administrative discretion to apportion the non-deductible expenses

Unlike the case of Total Asset Method where the Comptroller is explicitly given the administrative discretion to allow a portion of the common interest expense attributable to income-producing assets under Section 14(1)(a) of the ITA, Sections 10E(1)(a) and 14(1) do not expressly provide the Comptroller with the discretion to apportion the expenses. It is therefore unclear what basis the Board relied upon for affirming the Comptroller's exercise of administrative discretion to apportion the non-deductible expenses in the present case.

Legality of a Tax-Optimising Trust Structure – Lau Sheng Jan Alistair V Lau Cheok Joo Richard and Another [2023] SGHC 196

THE FACTS

The respondents were a married couple who purchased a landed property ("the Property") for a total consideration of S\$4.925 million. Subsequent to the purchase, the respondents engaged a solicitor to draft and execute a Trust Deed ("the Trust"), pursuant to which, the respondents were to hold the Property, or alternatively, the net proceeds of the sale of the Property, on trust as joint trustees for the sole benefit of their elder child and only son ("the applicant").

When the respondents' marital relationship broke down and divorce proceedings commenced, the applicant sought to terminate the Trust and have the Property vested in him immediately. The applicant's application was supported by his mother ("the second respondent") but opposed by his father ("the first respondent").

The parties disputed the purpose of the Trust. The applicant and the second respondent said that the Trust was created to gift the applicant a legacy property while the respondents were still alive.

In contrast, the first respondent alleged that the Trust was created to avoid the payment of Additional Buyer's Stamp Duty ("ABSD") and was a sham instrument. Factually, the respondents avoided paying S\$738,750 in ABSD as a result of the creation of the Trust.

The High Court agreed with the applicant that he had established a *prima facie* case for the termination of the Trust. The case then turned to whether the first respondent's arguments – that the Trust was a sham instrument or for an illegal purpose – succeeded.

THE HIGH COURT'S DECISION

Whether the Trust Deed was a sham

The High Court observed that a trust deed would be a sham if it was never intended by the settlors to create an arrangement for them to divest themselves of the aspects of beneficial ownership in the manner that is provided for in the Trust, while intending to give that false impression to third parties or to the court.

To ascertain the parties' intentions, the High Court took into account the terms of the Trust, the terms of the loan agreement, and the circumstances of the parties leading up to the creation of the Trust. The evidence (for example, the irrevocable nature of the Trust) showed that the Trust was set up by the respondents to transfer beneficial interest in the Property to the applicant.

The fact that the Trust arrangement additionally allowed the respondents to save on ABSD was an incidental benefit that did not detract from the respondents' overall intention to gift their son a legacy property while both of them were still living.

The High Court held that the Trust Deed was not a sham.

Whether the Trust was constituted for an illegal purpose

Assuming that the Trust was valid, the High Court then turned to considering the issue of whether the Trust was unenforceable because it was constituted for an illegal purpose. In doing so, the High Court clarified that the test for illegality in the context of trusts was a modified version of the *Ochroid Trading*³ framework.

Since the Trust Deed was not a sham instrument and was intended to benefit the applicant, the High Court found on the evidence that the Trust Deed was not created for the illegal purpose of avoiding ABSD (which is merely incidental). There was also no statutory illegality that would render the Trust Deed illegal in and of itself. Finally, the High Court granted a declaration for the Trust to be terminated and for the respondents to transfer the Property to the applicant.

Conclusion

And that's a wrap for the notable 2023 tax cases. Be sure to stay up to date on the latest tax jurisprudence in Singapore.

Please click [here](#) to rate this article.

³ See *Ochroid Trading Ltd and another v Chua Siok Lui and another* [2018] 1 SLR 363

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